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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**  
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8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 ALFONSO RIVERA-AVALOS, et al.,

12 Defendants.  
13

2:09-CR-262 JCM (RJJ)

14 **ORDER**

15 Presently before the court is petitioner Adrian Fuentes Garcia's motion for a certificate of  
16 appealability. (Doc. # 282).

17 **I. Background**

18 Petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. (Doc. # 250).  
19 The government filed a motion to dismiss the § 2255 motion (doc. # 255), and this court granted the  
20 motion to dismiss (doc. # 265). The order is silent regarding the issue of a certificate of  
21 appealability. (*See id.*). Petitioner filed this motion seeking a certificate of appealability for his §  
22 2255 motion. (Doc. # 282).

23 **II. Legal Standard and Discussion**

24 Before the petitioner can appeal the denial of a § 2255 motion, a certificate of appealability  
25 must issue. *See* 28 U.S.C. § 2253. Further, a certificate of appealability may issue "only if the  
26 applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. §  
27 2253(c)(2), and the certificate of appealability must "indicate which specific issue or issues satisfy"  
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1 the requirement, 28 U.S.C. § 2253(c)(3).

2 To make this substantial showing, petitioner must demonstrate “that reasonable jurists could  
3 debate whether (or, for that matter, agree that) the petition should have been resolved in a different  
4 manner or that the issues presented were adequate to deserve encouragement to proceed further.”  
5 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotations and citations omitted).

6 This court dismissed petitioner’s § 2255 motion on procedural grounds. (*See* doc. # 265).  
7 This court noted that “[m]otions to vacate a sentence pursuant to § 2255 are subject to a one-year  
8 statute of limitations.” (*Id.*); citing 28 U.S.C. § 2255(f). Further, “the one-year period runs from ‘the  
9 date on which the judgment of conviction becomes final.’” (*Id.*); quoting 28 U.S.C. § 2255(f)(1).

10 In the order dismissing the § 2255 petition, this court found that petitioner filed his petition  
11 510 days after his conviction became final, and 145 days after the statutory period elapsed. (*Id.*).  
12 The court also noted that it may equitably toll the one year statutory limit if warranted by  
13 extraordinary circumstances. (*Id.*) (citing *Holland v. Florida*, 130 S.Ct. 2549 (2010)); *see Miranda*  
14 *v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (“[T]he threshold necessary to trigger equitable  
15 tolling . . . is very high.”).

16 In the dismissal of the § 2255 petition, the court held that no extraordinary circumstances  
17 existed that warranted a tolling of the one year statutory time period. (*Id.*). In the instant motion,  
18 petitioner does not: (1) address the certificate of appealability standard; (2) does not even allege the  
19 denial of a constitutional right; or (3) attempt to indicate which issue or issues would satisfy the high  
20 bar for granting a certificate of appealability. (*See* doc. # 282). The court finds that no extraordinary  
21 circumstances warrant an equitable tolling for petitioner’s failure to timely file a § 2255 petition for  
22 all the reasons stated in its original order (doc. # 265).<sup>1</sup> The court declines to issue a certificate of  
23 appealability on the issue of equitable tolling.

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26 <sup>1</sup> The court denied the § 2255 petition for all the following reasons: (1) petitioner could not  
27 establish that a lack of certain documents prevented a timely filing; (2) petitioner did not actually  
28 need any documents to make his ineffective assistance of counsel allegations; and, (3) the case law  
cited by petitioner was actually inapposite. (Doc. # 262).

1 In the instant motion, petitioner alleges that he did not timely seek to appeal this court's  
2 dismissal of the § 2255 petition because he did not know about the dismissal until September 18,  
3 2012, (Doc. # 282), a date well after the window had closed to timely file a notice of appeal. This  
4 is not a true statement. First, the docket clearly shows that a copy of the dismissal order was mailed  
5 to defendant on May 17, 2012, and a copy of the entire docket was mailed to defendant on May 21,  
6 2012.

7 Second, petitioner's § 2255 petition did not address the equitable tolling issue. However, on  
8 May 29, 2012, petitioner filed a motion to permit equitable tolling. (Doc. # 270). Petitioner filed  
9 his motion to permit equitable tolling two weeks after copies were manually mailed to him. The  
10 court finds these facts clearly demonstrate that petitioner did receive a copy of the dismissal order  
11 and then filed a motion (doc. # 270) to address the order (doc. # 265). The court finds there has been  
12 no showing of the denial of a constitutional right and a certificate of appealability is not warranted.

13 Accordingly,

14 IT IS HEREBY ORDERED ADJUDGED AND DECREED that petitioner's motion seeking  
15 a certificate of appealability (doc. # 282) be, and the same hereby is, DENIED.

16 DATED October 11, 2012.

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19 UNITED STATES DISTRICT JUDGE